

Fall 1967

Politics and the Regulatory Agencies, by William L. Cary

Ralph F. Fuchs
Indiana University School of Law

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Recommended Citation

Fuchs, Ralph F. (1967) "Politics and the Regulatory Agencies, by William L. Cary," *Indiana Law Journal*: Vol. 43 : Iss. 1 , Article 10.

Available at: <https://www.repository.law.indiana.edu/ilj/vol43/iss1/10>

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BOOK REVIEWS

POLITICS AND THE REGULATORY AGENCIES. By William L. Cary. New York: The McGraw-Hill Book Company. 1967. Pp. 149. \$5.95.

In this volume of modest size, embodying his 1966 Cooley Lectures at the University of Michigan, the author has made important use of his observations and experience as chairman of the Federal Securities and Exchange Commission from early 1961 until his resignation three and one half years later to return to law teaching. In addition, the book's mature wisdom and resolute avoidance of generalizations transcending the available data contribute to a discussion that is realistic and filled with significant insights. Much of what is written here applies to the operations of federal administrative agencies generally and not merely to the so-called independent regulatory bodies with which the text is primarily concerned.

Although the book ends with a chapter of Generalizations and Conclusions, these are far from dogmatic. The net effect of the author's treatment is to exclude any rigid conceptual scheme surrounding the operations of agencies and their external relations. Thus he remarks that independent regulatory agencies carry on important functions but "have a relatively limited role";¹ that rule-making ought to be used more than it is in the development of agency policy,² but adjudication provides a better tool in some situations;³ and that the independence of the "independent" agencies is only partial, even a "myth," but has enough substance and confers enough benefit to warrant retention of this type of governmental unit.⁴ As respects executive control over the agencies, both the position that it should be thorough-going and the view that there is no place for it are unacceptable; Cary, by contrast, finds it "impossible to arrive at any absolute formula" to embrace the varying situations that arise.⁵

Government regulation of economic activity, through whatever kinds of agencies it may be undertaken, must go forward in a stream of powerful forces impeded by rocks of resistance. For the administrator to seek quiet back-waters removed from eddying currents or sheltered from the public gaze is to yield the central purpose; to be driven by a momentarily

1. W. CARY, *POLITICS AND THE REGULATORY AGENCIES* 125 (1967).

2. *Id.* 84.

3. *Id.* 82-84, 131.

4. *Id.* 135-139.

5. *Id.* 20.

impelling thrust is to run the risk of foundering on an immovable rock. All about are threatening snags and predatory creatures, as well as potential aid from friendly folk, some of whom took part in launching the regulatory craft. The craft itself is no simple, inert vessel like a raft, but rather a complex Maid of the Mist with interrelated parts and a driving force of its own. To navigate it successfully under all these conditions requires knowledge, skill, and determination of a high order.

The focus of Professor Cary's discussion is on the task of agency skippers in the complex, changing circumstances of voyages in political and economic waters. The governing policies prescribed by statute must be pursued with the means provided, which are adaptable and fairly numerous, and with the assistance that can be marshaled. It is idle to suppose that the legislature which originally charted the trip either was or remains unified and constant in support of it. It is equally fatuous to believe that any part of the executive establishment, from the President at its head to its component staff members and bureaus, does or could comprehend fully the specific regulatory enterprise; for they must be concerned with other, more pressing matters.⁶ Yet Congress and the President have a legitimate, continuing concern with the impact of the agency's acts upon matters of central governmental importance; each must play a role in providing funds, selecting agency personnel, considering supplemental legislation, and engaging in over-all criticism and surveillance of government operations. The affected business interests may be numerous, changing, and different from each other, rather than united and constant, but their power is great. In the total scene the agency has an assured place, albeit only a precarious effectiveness. Each move it makes is likely to arouse opposition that threatens its appropriation, the scope of its powers, or the continuance of its personnel.

The author deals with agency operations, especially policy-making, in the foregoing context, supplying numerous illustrations from the experience of the Securities and Exchange Commission and other agencies. He carries the subject through the legislative process as experienced by the Commission in securing the passage of the Securities Act Amendments of 1964,⁷ as well as into the area of relations with the White House. As to the latter, a series of experiences of the SEC,⁸ the problem of the FCC in launching its broad American Telephone and Telegraph Company investigation in 1965,⁹ and the difficulties

6. "In fact, government regulatory agencies are stepchildren whose custody is contested by both the Congress and the Executive, but without very much affection from either one." *Id.* 4.

7. Act of Aug. 20, 1964, Pub. L. No. 88-467, 78 Stat. 565.

8. W. CARY, *supra* note 1, at 13-19.

9. *Id.* 23-25.

surrounding controversial appointments and reappointments of commissioners and board members¹⁰ are summarized. Many aspects of agency relations with Congress, involving reorganizations, appropriations, pressures from private interests, and resistance to new agency regulations (as illustrated by experiences of the FCC and FTC) are covered in Chapter 2.

Professor Cary sets forth some cogent observations about recurring aspects of agency operations. He concludes that "no major step forward can be achieved by an old-line regulatory agency in the absence of support from some of the leaders of the industry it regulates."¹¹ He also takes the view that for the members of at least the Securities and Exchange Commission to become individually responsible for writing opinions in all formal adjudication carried on by the Commission itself, without the aid of an opinion-writing staff, would be to run the risk of undue diversion of time from essential policy-making tasks.¹² He believes the boards and commissions should be small, with not more than five members, and should resort to delegation to keep down the burden of work.¹³ He emphasizes that for a variety of reasons it would be a mistake to transfer the adjudicatory functions of most agencies to separate adjudicating bodies.¹⁴

Divestiture of the adjudicatory function of an agency would leave an administrator or commission charged with responsibility for carrying out the governing statute by the process, among others, of bringing proceedings before the adjudicating body. In these proceedings, Professor Cary points out, the initiating authority "could only hope to persuade an administrative court that on the basis of experience the court had not shared" particular decisions were called for. Here lies the principal reason for retaining in the unified agency one of the principal means of dealing with developing problems. In its absence there would be greater difficulty than now in securing competent, dedicated leadership for agencies which are supposed to shape their actions and secure results by close contact with the problems confronting them.

One naturally asks whether there is hope that the regulatory agencies, especially the so-called "independent" ones, can continue to command the needed personnel and otherwise to carry on successfully under the conditions Professor Cary describes. He gives much thought to this problem. A great deal depends on circumstances, especially the extent of the challenge

10. *Id.* 61-66.

11. *Id.* 69.

12. *Id.* 85.

13. *Id.* 134-135.

14. *Id.* 125-134.

involved in particular regulatory tasks. As has often been observed, new agencies are more likely than old ones to undertake their responsibilities with vigor and imagination. Professor Cary devotes much of his attention to the question whether "old-line" agencies can retain or regain these qualities. The SEC, which underwent something of a renaissance with Professor Cary as chairman during the Kennedy and early Johnson administrations, had not slumped as badly as some other agencies during the preceding period, as Professor Cary is quick to recognize. There were, moreover, certain favorable economic and political factors at work in relation to its tasks, notably the importance of reliable securities markets to private enterprise. Therefore the experience of the SEC is not necessarily a guide to other situations. The different circumstances surrounding other agencies can, however, be translated into more effective action in varying ways, as Professor Cary illustrates by reference to the contrasting methods of the FPC and FCC at critical periods.¹⁵ What cannot be dispensed with is dedication and resourcefulness on the part of both the staffs and the directing personnel. The infusion of these depends on many factors, cultural, political, and economic; but in the context of American life today the task is not hopeless, as this book demonstrates.¹⁶ Better long-run alternatives to the processes here described have yet to be found.

RALPH F. FUCHS†